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*The New York City Employees' Retirement System*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MARTIN VOGEL and KENNETH  
MAHONEY, on Behalf of Themselves and  
All Other Similarly Situated,

Plaintiffs,

v.

STEVEN JOBS, PETER OPPENHEIMER,  
FRED ANDERSON, WILLIAM V.  
CAMPBELL, MILLARD S. DREXLER,  
ALBERT GORE, Jr., ARTHUR D. LEVINSON,  
JEROME B. YORK and APPLE COMPUTER,  
INC.,

Defendants.

Case No.: C-06-05208-JF

**LEAD PLAINTIFF'S RESPONSE TO  
DEFENDANTS' REQUEST FOR  
JUDICIAL NOTICE RELATING TO  
THEIR MOTION TO DISMISS THE  
CONSOLIDATED CLASS ACTION  
COMPLAINT**

Date: September 7, 2007  
Time: 9:00 a.m.  
Department: Ctrm 3, 5<sup>th</sup> Floor  
Action Filed: August 24, 2006  
Trial Date: None Set  
Judge: Honorable Jeremy Fogel

1 The New York City Employee's Retirement System ("NYCERS" or "Lead Plaintiff"), on  
 2 behalf of itself and the putative class of Apple, Inc. ("Apple" or the "Company") shareholders it  
 3 represents ("Plaintiffs"), submits this response to Defendants' Request for Judicial Notice  
 4 relating to their Motion to Dismiss the Consolidated Class Action Complaint.

### 5 **INTRODUCTION**

6 Defendants have asked the Court to take judicial notice of a number of documents for  
 7 purposes of ruling on their Motions to Dismiss The Consolidated Class Action Complaint. For  
 8 the reasons set forth herein, Plaintiffs have no objection to this Court taking judicial notice of the  
 9 existence of documents filed with the Securities and Exchange Commission (the "SEC").  
 10 Plaintiffs do, however, object to this Court taking judicial notice of the truth of any statements  
 11 made in these documents.

### 12 **FACTUAL BACKGROUND**

13 Defendants have asked the Court to take judicial notice of a number of documents filed  
 14 by Apple with the SEC. *See* Exhibits A-F to the Declaration of Vivi N. Tran in Support of  
 15 Motion to Dismiss Consolidated Class Action Complaint. While Plaintiffs have no objection to  
 16 the Court taking judicial notice of the existence of the publicly filed documents, Plaintiffs  
 17 respectfully request that this Court not take judicial notice of the truth of these Documents.

### 18 **ARGUMENT**

19 Because "[a] motion to dismiss under Rule 12(b)(6) tests for legal sufficiency of the  
 20 claims alleged in the complaint . . . materials outside of the pleadings ordinarily are not  
 21 considered on a motion to dismiss." *Ramirez v. United Airlines, Inc.*, 416 F. Supp. 2d 792, 795  
 22 (N.D. Cal. 2005). However, "a court may consider matters properly subject to judicial notice"  
 23 without converting the motion to dismiss to one for summary judgment. *Id.* (citing *Adibi v. Cal.*  
 24 *State Bd. of Pharmacy*, 393 F. Supp. 2d 999, 1003 (N.D. Cal. 2005)). Federal Rule of Evidence  
 25 201 provides that "a court may take judicial notice of any fact 'not subject to reasonable dispute  
 26 in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy  
 27 cannot reasonably be questioned.'" *Id.* While the courts routinely take judicial notice of the  
 28

1 existence of publicly-filed documents, the truth of the matters contained in such documents is not  
 2 the proper subject of judicial notice.

3 **A. The Court Should Not Take Judicial Notice of the Truth of the Publicly Filed**  
 4 **Documents**

5 Defendants do not specify whether they are seeking notice of the truth of the publicly  
 6 filed documents. While Plaintiffs do not dispute that the Court can take judicial notice of the  
 7 existence of the SEC filings, the truth of any matters contained therein is not the proper subject of  
 8 judicial notice. *See, e.g., Marsh v. San Diego County*, 432 F. Supp. 2d 1035, 1044 (S.D. Cal.  
 9 2006) (noting that a “court may take judicial notice of what attached documents contain, but not  
 10 the truth of th[eir] contents”); *In re Infonet Serv. Corp. Sec. Litig.*, 310 F. Supp. 2d 1080, 1083  
 11 n.1 (C.D. Cal. 2003) (noting that “[j]udicial notice of SEC filings [is] proper when considered  
 12 ‘for the purpose of determining what statements the documents contain and not to prove the truth  
 13 of the documents’”) (quoting *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1275-78 (11th Cir.  
 14 1999)); *In re Adaptive Broadband Sec. Litig.*, No. C 01-1092 SC, 2002 WL 989478, at \*20 (N.D.  
 15 Cal. Apr. 2, 2002) (taking judicial notice of existence of Form 10-K but declining to “take  
 16 judicial notice of [its] truth”); *Cherednichenko v. Quaterdeck Corp.*, No. CV97-4320-GHK  
 17 (CWX), 1997 WL 809750, at \*4 n.4 (C.D. Cal. Nov. 26, 1997) (“We take judicial notice of the  
 18 10-K annual report because it is a public document filed with the SEC, but do not use it for its  
 19 truth.”). Accordingly, the Court should not take judicial notice of the truth of the Publicly Filed  
 20 Documents.

**CONCLUSION**

For the reasons set forth herein, Plaintiffs respectfully request that the Court decline to take notice of the truth of any allegations contained in the SEC filings submitted by Defendants in support of their motion to dismiss.

Dated: July 30, 2007

Respectfully submitted,  
**GRANT & EISENHOFER P.A.**

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